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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

RICHARD J. MURZYN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did petitioner receive a constitutionally fair trial in accordance with due process of law, where the jury which rejected petitioner's entrapment/coercion defense had been exposed—without benefit of limiting instructions —to extensive "other crimes-bad acts" evidence*?

2. In approving the trial court's admission of extensive and prejudicial "other crimes" and "bad acts" evidence for the ostensible purpose of "rebutting" petitioner's alternative coercion/entrapment defenses, has not the Seventh Circuit effectively emasculated the constitutionally-based "balancing" test developed by the judiciary over the years and recently codified as part of the Federal Rules of Evidence, respecting the necessity that the probable prejudicial effect of such evidence be balanced against its possible probative value?

3. Was petitioner deprived of his right to a fair trial, requiring reversal of his convictions, by the trial court's express violation of the constitutionally-based, specific and mandatory requirements and prohibitions of *United States* v. *Santiago,* 582 F.2d 1128 (7 Cir. 1978)—requiring that the court make factual findings *re* the existence of a conspiracy and forbidding the giving of interim instructions *re* how the jury should consider evidence of the acts and declarations of alleged co-conspirators?

4. Should the *Santiago* decision, *supra,* be declared the Law of the Land by this Court, either as constitutionally engendered or as a proper interpretation of F.R.E. 104, necessary to protect defendants in conspiracy cases from the likelihood of ineradicable prejudice under former practice?

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* The evidence is detailed in note 5, *infra,* p. 7.

5. Was petitioner deprived of effective assistance of counsel, upon the following facts (which must, we submit, be cumulatively considered): Counsel failed to request limiting instructions as to the manner in which the jury could consider the "bad acts-other crimes" evidence above complained of; had not read this Court's latest pronouncements on the law of entrapment, a crucial defense; and failed to request that the trial court follow the requirements of *Santiago, supra,* which included a failure to object to the forbidden "interim instruction" noted above—as a result of which petitioner suffered manifest prejudice, in that the jury was thereby given *carte blanche* to consider the prejudicial evidence and was subjected to the prejudicial influences inherent in the forbidden "interim" instructions?

6. Did the Court of Appeals properly apply the required standards of appellate review appropriate to the consideration of petitioner's claims of multiple constitutional error?

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1. The Court of Appeals did not properly apply the required standards of appellate review appropriate to the consideration of petitioner's claims of multiple constitutional error. Certiorari should be allowed so that this Court may speak once again to the matter of "harmless error" respecting claims of constitutional error, as the instant decision illustrates that federal courts of review are disregarding past pronouncements on this subject 9

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2. In approving the trial court's admission of "other crimes" and "bad acts" evidence for the purpose of "rebutting" petitioner's alternative entrapment/coercion defenses, the Seventh Circuit has all but emasculated the Federal Rules of Evidence as codification of long-standing (and, we thought, still-standing) judicial rules of constitutional necessity respecting the requirement of balancing possible proba-

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tive value against probable prejudicial impact. Here, allowing the use of such evidence deprived petitioner of his constitutional right to a fair trial.

Additionally, here, the prejudicial impact was "guaranteed" by the trial court's failure to give any manner, shape or form of limiting instruction concerning the purposes for which such evidence could be considered 14

3. Petitioner was deprived of his right to a fair trial by the trial court's express violation of the specific and mandatory requirements and prohibitions of *United States* v. *Santiago,* 582 F.2d 1128 (7 Cir. 1978)—requiring the court to make factual findings *re* the existence of a conspiracy and forbidding the giving of interim instructions *re* how the jury should consider evidence of the acts and declarations of alleged co-conspirators. The *Santiago* decision should be declared the Law of the Land by this Court, either as constitutionally engendered or as a proper interpretation of F.R.E. 104, necessary to protect defendants in conspiracy cases from the likelihood of ineradicable prejudice due to pre-Rule 104 procedures. Certiorari should be allowed to insure uniformity amongst the Circuits as to the application of the Federal Rules of Evidence with respect to conspiracy trials 21

4. Petitioner was deprived of effective assistance of counsel, upon the following facts (which must be cumulatively considered): Counsel failed to request limiting instructions as to the manner in which the jury could consider the "bad acts-other crimes" evidence above complained of; had not read this Court's latest pronouncements on the law of entrapment, a crucial defense; and failed to request that the trial court follow the requirements of *Santiago, supra,* which included a failure to object to the forbidden "interim

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instruction'' noted above—as a result of which petitioner suffered manifest prejudice, in that the jury was given *carte blanche* to consider the prejudicial evidence and was subjected to the prejudicial influences inherent in the forbidden ''interim'' instructions. Certiorari should be allowed so the Court may speak to whether such performance by counsel can be deemed constitutionally sufficient where those same failures by counsel were held by the Seventh Circuit to constitute waiver of the issues involved 23

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NO.

RICHARD J. MURZYN,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Richard J. Murzyn, respectfully prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit to review its decision affirming his convictions upon charges involving interstate transport and sale of stolen automobiles, in violation of 18 U.S.C. §§ 371, 2312 & 2313.

Judgment and Opinion Below

The opinion of the Court of Appeals for the Seventh Circuit, Nos. 79-1855[1] & 79-1861, is reported at 631 F.2d 525. A copy is attached as Appendix A, per Rule 21.1(k)(i) of this Court.

Jurisdictional Statement

On October 3, 1980, the Seventh Circuit filed its opinion affirming the judgment of the United States District Court for the Northern District of Indiana, Hammond Division, finding petitioner guilty as charged. (App. A) Petitioner's timely petition for rehearing was denied on October 30, 1980. (App. B) This Petition is filed within the time allowed by an order of this Court entered on December 29, 1980, extending the time within which a petition for certiorari may be filed until January 19, 1981.[2] Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Rule 20.1.

Constitutional Provisions, Statutes and Rules Involved

The Fifth Amendment to the United States Constitution provides, in part:

> "No person . . . shall be . . . deprived of life, liberty, or property, without due process of law; . . ."

The Sixth Amendment to the United States Constitution provides, in part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

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[1] No. 79-1855 was the (consolidated) appeal of co-defendant Russell Hall, not a party to these proceedings, while No. 79-1861 was petitioner's appeal.

[2] This order was entered by Mr. Justice Stevens, granting petitioner's motion filed December 29, 1980, under interim No. A-566.

There is no issue in this Petition as to the interpretation of any statute. The statutes, for violation of which petitioner stands convicted, are Title 18, sections 371, 2312 & 2313.

The pertinent Federal Rules of Evidence, [hereafter, F.R.E.], read as follows:

RULE 104—PRELIMINARY QUESTIONS

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests.

(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

RULE 401—DEFINITION OF "RELEVANT EVIDENCE"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

RULE 402—RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

RULE 403—EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

RULE 404—CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

(a) Character evidence generally. Evidence of a person's character or trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

* * *

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissbile to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

RULE 405—METHODS OF PROVING CHARACTER

(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

RULE 801—DEFINITIONS

The following definitions apply under this article:

(a) Statement.—A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant.—A "declarant" is a person who makes a statement.

(c) Hearsay.—"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay.—A statement is not hearsay if—

• • •

(2) Admission by party-opponent.—The statement is offered against a party and is • • • (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

RULE 802—HEARSAY RULE

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

STATEMENT OF THE CASE

Basis for Federal Jurisdiction

Petitioner was indicted for having violated federal criminal statutes, to wit, 18 U.S.C. §§ 371, 2312 & 2313. Per Supreme Court Rule 21.1(i), the basis for federal jurisdiction in the court of first instance is 18 U.S.C. § 3231.[3]

Statement of Facts

All facts essential to understanding and resolution of the questions presented by this Petition are contained in the Court of Appeals' opinion, App. A, and are not repeated here to avoid unnecessary duplication. Specific facts relevant to the Points which follow are set forth therein. Briefly summarized, the facts are:

Petitioner was found guilty by a jury as charged in Indictment No. HCR 78-105, of interstate transportation of three stolen vehicles (Counts 1, 3 & 5), the sale/disposition of those same automobiles (Counts 2, 4 & 6), and conspiracy to engage in the above activity (Count 7), in violation of 18 U.S.C. §§ 2312, 2313 and 371, respectively.

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[3] 18 U.S.C. 3231 provides, in pertinent part, that "The District Courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States."

The jury which rejected petitioner's entrapment/coercion defense[4] had been exposed to extensive "other crimes-bad acts" evidence.[5] No limiting instructions as to the permissible use of this evidence had been requested or given.

Moreover, the jury had been instructed in direct violation of the Seventh Circuit's mandate in *United States* v. *Santiago*, 582 F.2d 1128 (7 Cir. 1978).[6]

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[4] The jury was instructed as to these defenses. (Tr. 162-65)

[5] As [under]stated by the Seventh Circuit:

> "The evidence complained of is that Murzyn once put a gun to the head of a federal agent then working undercover and asked, 'Are you a fed?'; that he solicited Fitch's and Ferguson's services for the assassination of one Bruce Green, whom he purportedly described as a 'nigger drug pusher' who was interfering with Murzyn's drug trade; that he used both crude sexual slang and derogatory racial slang; that he told Fitch that he had stolen trees from a nursery, shrubbery from a cemetary (*sic.*), and a cupola from a construction site; that he offered to produce Stechalski for Ferguson and Fitch so that they could beat him up, that he said he had obtained stolen rifles from Stechalski; and that he displayed a shotgun to Fitch and once, without explanation, fired five rounds from a rifle into a lake in Fitch's presence." App. 4; see also Def. Br. pp. 20-23 for verbatims and Tr. refs.

[6] As will be more fully elucidated *infra*, pp. 21-22, *Santiago* requires the trial court to make certain factual determinations as to the existence of a conspiracy, and forbidding the formerly *de rigueur* giving of interim instructions *re* how the jury should consider evidence of co-conspirators' acts and declarations.

REASONS FOR GRANTING THE WRIT

Prefatory Statement

> "A criminal trial is not a game in which the . . . [prosecution's] function is to outwit and entrap its quarry. The . . . [prosecution's] pursuit is justice, not a victime." Mr. Justice Fortas, concurring in *Giles* v. *Maryland*, 386 U.S. 66, 100 (1967).
>
> "A . . . criminal proceeding—is not a sporting event." *Id.* at 102.

Still, the omnipresent due process requirement of fair play must ever be the watchword.

Here, defense counsel's ineptitude and unfamiliarity with the most rudimentary means of attempting to protect his client from prosecutorial overkill resulted in the jury's receiving no guidance whatsoever concerning the manner in which other crimes-bad acts evidence could properly be considered, and caused the jury to be instructed in a highly prejudicial manner as to the interim consideration of evidence of the acts and declarations of alleged co-conspirators.

Our major quarrel is with the Court of Appeals' pronouncement that the prejudicial occurrences did not result in any harm to petitioner. Indeed, it is all too probable that the prejudicial impact of the "other crimes-bad acts" evidence was so extensive that it could not even have been overcome by proper instructions; as one reviewing court succinctly put it:

> "'[I]f you throw a skunk in the jury box, you can't instruct the jury not to smell it.'" *Dunn* v. *United States*, 307 F.2d 883, 886 (5 Cir. 1962).

We submit the Judges here failed to consider the probable effect of the material complained of upon the minds of reasonable laypersons on the jury, and cannot help but recall the astute observation, cast thus in conversation:

> "'In journalism,' said Lousteau, 'everything that is probable is true. That is an axiom.'
>
> "'Criminal procedure is based on the same rule,' said Vernou."[7]

We ask Your Honors to keep in mind this all-too-true "rule" in assessing the probable damage suffered by petitioner from the jury's exposure to the evidence complained of in the context of the instructions given and not given. Let not fair play become a dead letter, living only on paper

1.

The Court of Appeals did not properly apply the required standards of appellate review appropriate to the consideration of petitioner's claims of multiple constitutional error. Certiorari should be allowed so that this Court may speak once again to the matter of "harmless error" respecting claims of constitutional error, as the instant decision illustrates that federal courts of review are disregarding past pronouncements on this subject.

In an anomalous decision, the Seventh Circuit has, *sua sponte,* stretched the Federal Rules of Evidence beyond the breaking point to permit the use of evidence of petitioner's past "bad acts" to rebut his alternative entrap-

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[7] DE BALZAC, A DISTINGUISHED PROVINCIAL AT PARIS 210 (Illus. Library Ed., Colonial Press Co., Marriage transl.)

ment/coercion defenses.[8] Never before has such evidence ever been allowed by any court in respect to a *coercion* defense, which, we submit, must be treated in a manner different than entrapment. And even with regard to the entrapment defense, we submit the court has gone beyond the outermost permissible limits in allowing evidence of "bad acts" not logically relevant or appropriate to disproving this defense.

Although the jury was permitted to hear that petitioner was a "bad man"[9]—and the reviewing court approved admission of this evidence strictly on the theory it was relevant to disprove the entrapment/coercion defenses—the jury never was informed that they were only to consider such evidence for that limited purpose.[10]

And in total disregard of the recent decision in *United States* v. *Santiago,* 582 F.2d 1128 (7 Cir. 1978), the court, again, has excused the trial court's violation of the mandates of this decision on the flimsy theory of waiver,[11] despite its recognition that the interim instructions given to the jury prior to admission of the hearsay statements should not have been given.[12] Thus, the jury was permitted to consider this highly damaging evidence under the most

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[8] App. 3-11.

[9] The evidence complained of is summarized at App. 4; see also defendant's Original Brief, pp. 20-23.

[10] True, appointed defense counsel did not request such an instruction; but to the extent such omission supports a finding of waiver (as found by the panel), App. 11, it also supports a finding of incompetence of counsel. See Point 4, *infra.*

[11] App. 13.

[12] App. 12-13, especially at 13 fn. 11.

prejudicial circumstances, and the court's conclusion that this was rendered "harmless" because of an allegedly correct "final" instruction[13] flies in the face of such holdings as *Cool* v. *United States,* 409 U.S. 100 (1972), to the effect that the jury cannot be expected to follow the correct of various conflicting instructions on a given subject, if one of them is incorrect. *Cf.* dissenting opinion, *id.* at 107-08.

If there was waiver as to either or both of the above issues, then there was incompetence of court-appointed counsel, who admittedly had not even read the latest Supreme C rt pronouncement on entrapment at trial-time.[14]

And if there was error—as, indeed, the Court of Appeals admits—then the court has failed to apply constitutionally-mandated standards in ascertaining whether it prejudicially infected petitioner's trial; for the court never states the standard it has applied in making the "harmless" determination, while the law requires that the reviewing court not affirm in the face of constitutional error unless it can declare, beyond a reasonable doubt, that the error did not contribute to the conviction. *Chapman* v. *California,* 386 U.S. 18, 24 (1967). Here, we submit, the court did not so state because it could not, in good conscience, so determine.

Where prejudicial evidence was emphasized time and again by the prosecution in closing argument,[15] the court's conclusions of "waiver" and "harmless error" should

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[13] App. 13-14.

[14] App. 16. The panel (incredibly) found both no prejudice and no incompetence.

[15] App. 14; see also Def. Br. pp. 43-44.

not stand as law. The decision is a monument to the desire to affirm at all costs, if only the reviewing court be convinced of the appellant's guilt.[16]

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[16] This, in contradiction to the following holding, in the language of Mr. Justice Frankfurter, speaking for the Court:

> "In view of the Government's insistence that there is abundant evidence to indicate that . . . [defendant was guilty], it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials . . . .
>
> ". . . All law is technical if viewed solely from concern for punishing crime without heeding the mode by which it is accomplished. . . . From presuming too often all errors to be 'prejudicial,' the judicial pendulum need not swing to presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be." *Bollenbach* v. *United States*, 326 U.S. 607, 614 (1946).

And as Judge Swygert stated, dissenting in part in *United States* v. *Johnson*, 515 F.2d 730, 736, 741 (7 Cir. 1975):

> "Unless we are indeed confident that a trial error was harmless, should we not insist that criminal trials be conducted so as not to be faced with that perennial hard question: Does the end justify the means? If procedural requirements are waived simply because we as appellate judges believe from an examination of the record that a defendant *is* guilty in fact, then the safeguards erected for fair trials crumble swiftly." (Emphasis added.)

See also compelling words of Judge Pell, concurring in *United States* v. *Matos*, 444 F.2d 1071, 1074-75 (7 Cir. 1971).

To allow this decision to persist is to say, "anything goes," to the prosecutors and trial courts; worse, it is an abnegation of a salutary principle we thought pervaded our criminal justice system—that is, that the ultimate burden to see that the jury is properly instructed "rests squarely on the shoulders of the trial judge."[17]

GUIDING PRINCIPLE ON REVIEW

Within the framework of the "harmless error" guidelines above set forth, one other consideration should stand in the forefront of Your Honor's collective judicial mind in ascertaining whether certiorari should be allowed: that is, that the *cumulative effect* of alleged prejudicial errors, not the isolated effect of numerous specific incidents complained of, must govern in making the ultimate "harmless error" determination. *Kotteakos* v. *United States,* 328 U.S. 750, 761-75 (1946); *United States* v. *Harding,* 525 F.2d 84, 91 (7 Cir. 1975); *Baines* v. *United States,* 426 F.2d 833, 835 (5 Cir. 1970); *Getchell* v. *United States,* 282 F.2d 681, 691 (5 Cir. 1960); *Marcus* v. *United States,* 422 F.2d 752, 753 (5 Cir. 1970). This "gestalt" approach[18] is particularly applicable in assessing the ineffective assistance of counsel claim on review, see *United States* v. *Hammonds,* 425 F.2d 597, 604 (D.C. Cir. 1970), as has specifically been recognized by the Seventh Circuit. *Wilson* v. *Phend,* 417 F.2d 1197, 1199 (7 Cir. 1969). Under this approach, the totality of the alleged omissions and errors of counsel must be considered as a whole. *Ibid.*

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[17] *Williamson* v. *United States,* 332 F.2d 123, 132 (5 Cir. 1964).

[18] See opinion of Judge Swygert in *Johnson, supra,* note 16, at 740.

The reviewing court's failure properly to adhere to the above-stated controlling standards applicable to appellate review has resulted in the opinion affirming petitioner's convictions herein.

For these reasons, as expanded below, certiorari should be allowed.

2.

In approving the trial court's admission of "other crimes" and "bad acts" evidence for the purpose of "rebutting" defendant's alternative entrapment/coercion defenses, the Seventh Circuit has all but emasculated the Federal Rules of Evidence as codification of long-standing (and, we thought, still-standing) judicial rules of constitutional necessity respecting the requirement of balancing possible probative value against probable prejudicial impact. Here, allowing the use of such evidence deprived petitioner of his constitutional right to a fair trial.

Additionally, here, the prejudicial impact was "guaranteed" by the trial court's failure to give any manner, shape or form of limiting instruction concerning the purposes for which such evidence could be considered.

It was improper for the jury to be permitted to consider —*carte blanche* and with no limitation whatsoever—evidence of a host of "other crimes" and "bad acts" attributed to petitioner, which had no reasonable connection whatsoever to the crimes charged.[19] The reviewing court has deemed such evidence admissible to disprove petitioner's proffered alternative defenses of entrapment and/or coercion,[20] creating this basis *sua sponte* in a dangerous

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[19] This evidence is summarized by the reviewing court at App. 4. See footnote 5, p. 7, *supra*.

[20] The jury was instructed as to these defenses; see Tr. 162-65.

over-expansion of the concept of "relevance" under the Federal Rules of Evidence,[21] and in utter derogation of the constitutionally-based premise of Rule 404(b) that the court must weigh the possible probative value of such evidence against its probable prejudicial impact.[22]

Before the advent of the Federal Rules of Evidence, the Seventh Circuit had held:

> "As a general rule, evidence of prior criminal acts of an accused, which are not charged in the indictment or information, is inadmissible. (Citing cases.) More precisely, evidence of the commission of prior criminal acts is not competent to prove that the accused committed the act charged in the indictment or information. This rule reflects a firmly rooted notion of our jurisprudence—*a man ought not be convicted of doing a specific bad act because he is a bad fellow generally.*" *United States* v. *Fierson,* 419 F.2d 1020, 1022 (7 Cir. 1969). (Emphasis added)

The federal case law on the subject, as iterated in *Fierson, supra,* has been codified in the Federal Rules of Evidence, Rule 404(b).[23]

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[21] F.R.E. 401; see App. 7.

[22] The panel's use of the "relevance" talisman in Rule 401, see App. 7, to all but eliminate any meaningful balancing approach as required by Rule 404(b), contradicts such holdings as *United States* v. *Ostrowsky,* 501 F.2d 318, 321-23 (7 Cir. 1974).

[23] Rule 404(b) provides:

> "Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Clearly, the Federal Rules of Evidence have not altered the pre-Rule law on this subject. See, *e.g., United States* v. *Goichman,* 547 F.2d 778, 782 n.1 (3 Cir. 1976) (affirming); *United States* v. *Beechum,* 555 F.2d 487 (5 Cir. 1977) (reversing, with a lengthy and scholarly exposition interrelating pre- and post-Rule law); 2 WEINSTEIN & BERGER, EVIDENCE 404(08) (1975) (Rule 404(b) merely codifies prior federal doctrine *re* evidence of past bad acts.)

In *Beechum, supra,* the reviewing court reversed, stating:

> "We do not believe that the new rules of evidence wrote a new set of commandments on a wholly new slate. As a codification founded on its historical antecedents, the Federal Rules of Evidence shall not be taken to repeal the products of our studied deliberation unless that intention is clearly manifest." *Id.,* 555 F.2d at 509.

Turning to the "studied deliberation" of prior learned judicial decision, consider the following language, where, commenting on the general rule excluding "other crimes" evidence, this Court held:

> "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. . . . The state may not show defendant's prior trouble with the law, specific acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant, on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Michelson* v. *United States,* 335 U.S. 469, 475-76 (1948).

* * *

To the extent that some "prior bad acts" evidence may properly have been admissible with respect to entrapment —that is, to show predisposition—*only* those incidents relating to petitioner's willingness to commit theft could possibly be considered "relevant"; yet, the jury was also permitted to consider evidence demonstrating his alleged narcotics dealings,[24] involvement with guns, and propensity for violence,[25] not to mention abusive sexual and racial slang.[26] In effect, then, petitioner is a victim of prose cutorial overkill.

Admission of the non-theft-related prior misconduct evidence was rationalized on the basis that it negated the coercion defense.[27]

While the reviewing court opines that coercion at the hands of government officials is merely an "extreme form of entrapment,"[28] we vehemently differ with this blithe

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[24] In particular, reference to narcotics was extremely prejudicial and, in context, unjustifiable. See *United States* v. *Clemons*, 503 F.2d 486, 491 (8 Cir. 1974), where the court (reversing) said:

> "'In today's society possibly no act is more abhorred than the selling of narcotics. And nothing makes it more difficult for a defendant to receive a fair and unbiased trial than for the jury to think that defendant or his acquaintances are men of bad character.'"

Accord: United States v. *Gentile*, 495 F.2d 626, 630-33 (5 Cir. 1974); *United States* v. *Crawford*, 438 F.2d 441, 447-48 (8 Cir. 1971); *Osborne* v. *United States*, 351 F.2d 111, 117-18 (8 Cir. 1965)

[25] See, *e.g.*, *United States* v. *Ostrowsky*, *supra*, note 22.

[26] App. 4.

[27] App. 7-11.

[28] App. 8, citing cases.

characterization. In essence, entrapment is to coercion what seduction is to rape.[29] In holding that "other crimes" evidence is admissible to disprove coercion, the court holds that a thief cannot be coerced—a conclusion just as erroneous, we submit, as the no-longer-condoned, formerly prevalent notion that a whore cannot be raped. Again, while (conceivably) certain of the evidence concerning petitioner's predisposition to *violence* theoretically may be relevant to shed light on the manner in which he may be presumed to have subjectively reacted to the coercive pressures to which he testified, the evidence relevant to disprove entrapment—that is, the "thievery" evidence—his no relevance whatsoever to disprove coercion.[30]

In other words, limiting instructions were absolutely necessary to protect petitioner's right to a fair trial and to assure that he was not convicted for being a "bad man." It was not even enough, we submit, to instruct that the "other crimes and bad acts"; evidence was to be con-

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[29] As we see it, however, entrapment involves merely inducement—*i.e.*, seduction—whereas coercion involves the perception of the threat of force and infliction of bodily harm,—*i.e.*, rape. The complainant-witness in a rape case is functionally equivalent to the defendant asserting coercion as a defense, albeit one is the accuser and the other the accused. In principle, their positions are the same.

[30] Coercion is, of course, a valid defense. See instruction given at bar, Tr. 162-63. See also MATHES & DEVITT, JURY INSTRUCTIONS IN FEDERAL CRIMINAL CASES, 10.13, LABUY, MANUAL ON FEDERAL JURY INSTRUCTIONS—CRIMINAL, sec. 5.04. This defense has long been judicially recognized. See, *e.g.*, *United States* v. *Figol*, 2 Dall. 346, 347, 1 L.Ed. 490, 410 (Cir. Ct., Pa. Dist., 1795); *Commonwealth* v. *Reffitt*, 149 Ky. 300, 148 S.W. 48 (1912); *Rex* v. *Crutchley*, 5 Car & P 133, 172 Eng. Reprints 909 (1831). See Annot., *Coercion Compulsion or Duress to Criminal Prosecution*, 40 A.L.R.2d 908 (1955).

sidered only with respect to the two defenses; indeed, the jury should specifically have been instructed which evidence was allowed to be considered as to entrapment, and which as to coercion. But no limiting instructions *at all* were given, and the court, in a typical *non sequitur* we always have difficulty reconciling, found both waiver and effective assistance of counsel.[31]

Allowing the jury to hear all the "other crimes-past bad acts" evidence without limitation effectively deprived petitioner of the opportunity to have the jury consider his defenses under "appropriate judicial guidance." See quotation from *Bollenbach*, fn. 16, p. 12, *supra*.

Indeed, as to the coercion defense, admission of such evidence is, so far as we have been able to determine, absolutely without precedent. Use of the Federal Rules to justify this departure should not, we submit, be undertaken by the lower federal courts without scrutiny by this Court.

And as to the Janus-like stance taken by the court on the waiver-effective assistance of counsel dilemma with respect to appointed counsel's failure to request any limiting instructions as to the offensive evidence, consider the following language:

> "In the final analysis, it is not the parties who determine the charge the judge gives to the jury. The obligation rests squarely on the shoulders of the trial judge. Of course the system of time-tested rules of procedure can rightfully expect *competent* counsel to request appropriate charges or object to affirmative errors or significant omissions. But there are occasions and this Court recognizes them year by year, in

[31] App. 11, 13, 15-17. See Point 4, *infra*.

> which the trial court's erroneous action has such immediate and significant consequence that it must be noticed as plain error." *Williamson* v. *United States,* 332 F.2d 123, 132 (5 Cir. 1964) (Emphasis added.) (reversing for trial court's failure to give an instruction *re* accomplice testimony though none was requested)

In the complex gestalt constituting the case at bar, the trial court's failure to give the jury any guidance whatsoever as to the manner in which it may consider the voluminous other crimes evidence with respect to the distinct defenses of entrapment, which may be negated by "predisposition," and coercion, relating exclusively to the issue of the petitioner's perception of force and the threat thereof, amounted to plain error.

* * *

The introduction of the evidence complained of without restriction, magnified by prosecution argument,[32] deprived petitioner of that fair trial to which he is constitutionally entitled. The manner in which the Seventh Circuit managed to affirm warrants the attention of this Court.

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[32] See App. 14; see also Def. Br. pp. 43-44.

3.

Petitioner was deprived of his right to a fair trial by the trial court's express violation of the specific and mandatory requirements and prohibitions of United States v. Santiago, 582 F.2d 1128 (7 Cir. 1978)—requiring the court to make factual findings re the existence of a conspiracy and forbidding the giving of interim instructions re how the jury should consider evidence of the acts and declarations of alleged co-conspirators. The Santiago decision should be declared the Law of the Land by this Court, either as constitutionally engendered or as a proper interpretation of F.R.E. 104, necessary to protect defendants in conspiracy cases from the likelihood of ineradicable prejudice due to pre-Rule 104 procedures. Certiorari should be allowed to insure uniformity amongst the Circuits as to the application of the Federal Rules of Evidence with respect to conspiracy trials.

Despite the Seventh Circuit's recent mandatory holding in *United States* v. *Santiago,* 582 F.2d 1128 (7 Cir. 1978), the reviewing court has affirmed in the face of the trial court's clear violation of *Santiago's* specific requirements respecting the making of certain preliminary factual findings concerning the existence of a conspiracy, and its prohibition that no interim instructions be given on how the jury should consider evidence of the acts and declarations of alleged co-conspirators.[33]

While *Santiago* was decided pursuant to the Federal Rules, see *id.* at 1130-36, specifically involving interpretation of F.R.E. 104 in the light of F.R.E. 801(d)(2)(E) and 802, we submit that considerations of fundamental fairness (due process) underlie the holding, though not expressed as such by the Seventh Circuit.

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[33] App. 12-14.

But even if not viewed as constitutionally required, the rule of *Santiago* should be adopted, for the reasons stated by the Seventh Circuit therein, as a uniform requirement in the United States courts.

The *Santiago* decision aligned the Seventh Circuit with the First, Second, Third, Fourth and Eighth Circuits with respect to the manner in which preliminary co-conspirator questions are to be decided, and under what standard.[34] The Fifth, Sixth and Ninth Circuits follow different rules, and so does the Tenth, which apparently has not yet specifically considered the Rule 104 issue.[35]

The manner in which the judge is to deal with the very volatile issue of evidence of the declarations and acts of alleged co-conspirators in keeping with the Federal Rules of Evidence, and the circumstances under which the jury is permitted to consider such evidence, should be uniform throughout the federal judicial system. The present lack of uniformity amongst the Circuits as to these important questions under the Federal Rules of Evidence justifies the grant of certiorari herein.

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[34] *Santiago, id.* at 1132, nn.5-9, & 1134-35. See *United States* v. *Petrozziello,* 548 F.2d 20 (1 Cir. 1977); *United States* v. *Stanchich,* 550 F.2d 1294 (2 Cir. 1977); *United States* v. *Trowery,* 542 F.2d 623 (3 Cir. 1976); *United States* v. *Stroupe,* 538 F.2d 1063 (4 Cir. 1976); *United States* v. *Bell,* 573 F.2d 1040 (8 Cir. 1978).

[35] See *United States* v. *Thomas,* 567 F.2d 638 (5 Cir. 1978); *United States* v. *Mitchell,* 556 F.2d 371 (6 Cir. 1977); *United States* v. *Calaway,* 524 F.2d 609 (9 Cir. 1975); *United States* v. *Gutierrez,* 576 F.2d 269 (10 Cir. 1978).

4.

Petitioner was deprived of effective assistance of counsel, upon the following facts (which must be cumulatively considered): Counsel failed to request limiting instructions as to the manner in which the jury could consider the "bad acts-other crimes" evidence above complained of; had not read this Court's latest pronouncements on the law of entrapment, a crucial defense; and failed to request that the trial court follow the requirements of Santiago, supra, which included a failure to object to the forbidden "interim instruction" noted above—as a result of which petitioner suffered manifest prejudice, in that the jury was given carte blanche to consider the prejudicial evidence and was subjected to the prejudicial influences inherent in the forbidden "interim" instructions. Certiorari should be allowed so the Court may speak to whether such performance by counsel can be deemed constitutionally sufficient where those same failures by counsel were held by the Seventh Circuit to constitute waiver of the issues involved.

The jury that convicted petitioner rejected his entrapment/coercion defense after hearing voluminous evidence that he was a "bad man." (See Point 2, *supra.*) Although the court approves admission of this evidence *strictly* on the theory it was relevant to disprove the entrapment/coercion defense, the jury was never so informed; they received the evidence without limiting instructions. The Seventh Circuit held that trial defense counsel's failure to request a limiting instruction amounted to waiver on review. (App. 11)

And while recognizing that the "interim" instructions outlawed by the Seventh Circuit in *United States* v. *Santiago,* 582 F.2d 1128 (7 Cir. 1978), (see Point 3, *supra*), [as to the manner in which hearsay conspiratorial statements are to be considered], should not have been given, (App.

12-13, especially at p. 13 fn. 11), the court nonetheless finds the issue waived because counsel failed to object. (App. 16)[36]

We have always found it difficult to resolve the paradox of waiver on multiple crucial issues by "competent" counsel; how can it be both ways at the same time?

Again, it seems that the court, in its desire to affirm at all costs, has made petitioner pay the penalty; and in so doing, the court deviates from the requirements of appellate review as stated in *Bollenbach.*[37] Indeed, the decision stands (and should fall) as a monument to the desire of appellate judges to affirm "no matter what," if only they be convinced of the appellant's guilt.

Especially in determining claims of ineffective assistance of counsel, a reviewing court must carefully consider the omissions as a whole,[38] and must not affirm in the face of constitutional error unless it can declare, beyond a reasonable doubt, that the error did not contribute to the conviction. *Chapman* v. *California,* 386 U.S. 18, 24 (1967); *United States* v. *Hammonds,* 425 F.2d 597, 604 (D.C. Cir. 1970); *Wilson* v. *Phend,* 417 F.2d 1197, 1199 (7 Cir. 1969).

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[36] Also contributing to the "gestalt" of the ineffective assistance is counsel's failure to have read the Court's latest entrapment decision. While viewing such failure as "serious," the court finds no prejudice. (App. 16) Trial preparation can be as important as courtroom performance, *Wolfs* v. *Britton,* 509 F.2d 304, 309 (8 Cir. 1975); *Moore* v. *United States,* 432 F.2d 730, 735 (3 Cir. 1970). Specifically, counsel's failure to know relevant law has been held ineffective assistance. See, *e.g., People* v. *Ibarra,* 60 Cal.2d 460, 34 Cal. Rptr. 863, 386 P.2d 487 (1963).

[37] See quotation in fn. 16, p. 12, *supra,* and other references therein.

[38] We adopt and incorporate herein such portions of the *Prefatory Statement,* pp. 8-9, and of Point 1, pp. 9-14, as may bear on the incompetence issue.

These standards were not followed here. (See *Prefatory Statement* and Point 1, *supra.*)

Falling back on the talisman of "trial tactics," as does the court, does not comport with these standards and should be condemned by this Court.[39]

Petitioner did not receive effective assistance of counsel. Certiorari should be allowed.

CONCLUSION

For any or all of the foregoing reasons, certiorari should be allowed; and, on considering the merits of the questions raised herein, petitioner's conviction should be reversed and the cause remanded for a new, constitutionally fair trial.

Respectfully submitted,

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Attorneys for Petitioner

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[39] "Trial tactics" is a panacea for a multitude of sins; but where —as here—there is no conceivable reason for counsel *not* to request limiting instructions and *not* to object to the anti-*Santiago* interim instruction, that appellation remains an apparition of the appellate court. In other words, how can one call "trial tactics," action or (as here) inaction with no possible pro-petitioner purpose? Certiorari should be allowed, if only for this Court to speak to the fine line between "trial tactics" and incompetence—a tight-wire too many defendants unwittingly must walk.

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 79-1855 and 79-1861

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RICHARD MURZYN, a/k/a "MO MO", and RUSSELL HALL,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
No. H CR 78-105—**Allen Sharp**, *Judge.*

ARGUED JUNE 12, 1980—DECIDED OCTOBER 3, 1980

Before PELL, BAUER, *Circuit Judges*, and CROWLEY, *District Judge.**

BAUER, *Circuit Judge.* In these consolidated appeals from their convictions after a joint trial on charges involving the interstate transport and sale of stolen automobiles, the defendants contend that they were by various means denied a fair trial. Specifically, defendant Richard Murzyn argues that he was deprived of a fair trial by the introduction of evidence of his past misconduct to prove his predisposition to commit the crimes

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* The Honorable John Powers Crowley, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, is sitting by designation.

charged and to negate his defenses of coercion and entrapment; by the omission of an instruction on the pertinence of the past misconduct evidence; by an erroneous instruction on the co-conspirator hearsay rule; by various instances of prosecutorial misconduct and trial court errors; by the inadequacy of the representation afforded him by counsel; and by the admission of evidence concerning eight acts of intrastate auto theft charged as overt acts in the indictment's conspiracy count. Defendant Russell Hall contends that he was deprived of a fair trial by the denial of his motion for severance and by the trial court's comment on a piece of identification evidence. We find the trial to have been fair and free of prejudicial error.

I.

This case arose out of an undercover investigation conducted between April and September of 1978 concerning the trade in stolen, late-model, luxury cars in northern Indiana. The investigation, which was centered in Hammond, Indiana, was run jointly by the Federal Bureau of Investigation and the Indiana State Police.

On May 8, 1978, Indiana State Police officer Joseph Fitch, then posing in an undercover role as Joe Fields, a stolen car fence from southern Indiana, was introduced to defendant Murzyn by Louis Ferguson, a paid police informant with an extensive criminal record and a longtime acquaintance of Murzyn's. According to testimony by Finch and Ferguson, which Murzyn disputed at trial in his own direct testimony, Murzyn offered at this meeting to supply Fitch with stolen cars. The remainder of the government's case was largely devoted to evidence concerning a series of preliminary meetings and negotiations between Fitch and Murzyn, the fruition of these negotiations in the separate deliveries to Fitch of ten stolen Lincolns and Cadillacs, and the ultimate apprehension and arrest of Murzyn and of two persons alleged to have stolen the cars and delivered them to

Fitch while in Murzyn's employ. One of these two persons was defendant Hall.[1]

Murzyn's defense at trial centered on an effort to prove that one John Stechalski, then deceased, had been the leader of the car theft ring and that Murzyn had merely undertaken the role of go-between for Fitch and Stechalski because he feared for his life. Specifically, Murzyn sought to show that various statements and actions by informant Ferguson and by Fitch caused him to believe that if he did not aid Fitch in securing stolen cars he might be seriously harmed either by Fitch or by a supposedly dangerous friend of Ferguson named Ray Sanders. Hall's defense was that of mistaken identification.

The jury found Murzyn guilty on each count of the seven-count indictment: He was convicted on three counts of interstate transportation of stolen vehicles in violation of 18 U.S.C. § 2312, on three counts of interstate sale of stolen vehicles in violation of 18 U.S.C. § 2313, and on one count of conspiracy to commit the above crimes in violation of 18 U.S.C. § 371. Murzyn was sentenced to a total of sixteen consecutive years of imprisonment and was fined $21,000.

Hall had been charged only with two counts of interstate transport and two counts of interstate sale of stolen vehicles and with conspiracy. He was convicted by the jury on those counts and was sentenced to five years of imprisonment on each count, the sentences to run concurrently.

II.

Murzyn first contends that his defense was prejudiced and his trial rendered fundamentally unfair by the government's introduction of evidence of his prior mis-

[1] The other person, Dennis Matthews, was indicted along with Murzyn and Hall and pleaded guilty prior to trial. Matthews was convicted and sentenced on the basis of that plea.

conduct to prove that he had not been entrapped or coerced. The evidence complained of is that Murzyn once put a gun to the head of a federal agent then working undercover and asked, "Are you a fed?"; that he solicited Fitch's and Ferguson's services for the assassination of one Bruce Green, whom he purportedly described as a "nigger drug pusher" who was interfering with Murzyn's drug trade; that he used both crude sexual slang and derogatory racial slang; that he told Fitch that he had stolen trees from a nursery, shrubbery from a cemetary, and a cupola from a construction site; that he offered to produce Stechalski for Ferguson and Fitch so that they could beat him up, that he said he had obtained stolen rifles from Stechalski; and that he displayed a shotgun to Fitch and once, without explanation, fired five rounds from a rifle into a lake in Fitch's presence.

The seminal statement concerning the use of prior misconduct or other character evidence to demonstrate predisposition and thus rebut a defense of entrapment appears in *Sorrells v. United States*, 287 U.S. 435, 451-52 (1932):

> The predisposition and criminal design of the defendant are relevant. But the issues raised and the evidence adduced must be pertinent to the controlling question whether the defendant is a person otherwise innocent whom the government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials. If that is the fact, common justice requires that the accused be permitted to prove it. The government in such a case is in no position to object to evidence of the activities of its representatives in relation to the accused, and if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense.

Since *Sorrells*, appellate courts have endeavored to impose "appropriate" and reasonable restraints on the use of character evidence to prove predisposition. The resulting rulings reflect the approach to character evidence taken in the Federal Rules of Evidence[2] and

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[2] The relevant Federal Rules of Evidence are Rules 404 and 405. Rule 404 provides, in pertinent part:

> (a) *Character evidence generally.* Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
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> (1) *Character of accused.* Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;
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> * * *
>
> (b) *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 405 provides,

> (a) *Reputation or opinion.* In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
>
> (b) *Specific instances of conduct.* In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

As we read these rules, assertion of an entrapment defense falls within the ambit of Rule 404(a)(1) because it puts the accused's predisposition to commit the crime in issue. Accordingly, the government is entitled to rebut an entrapment defense by evidence of the accused's character introduced to prove that he "acted in conformity therewith" and was, at the relevant time, predisposed to commit the crime charged. Under Rule 405(b), the government may do this by resort to evidence of the accused's prior specific acts. This is the case because predisposition is, in effect, an "essential element" of

(Footnote continued on following page)

hold, as a general proposition, that character evidence may be used to prove predisposition if its probative value outweighs its potential for unfair prejudice. *See, e.g., United States v. Ambrose*, 483 F.2d 742, 748 (6th Cir. 1973); *United States v. Johnston*, 426 F.2d 112, 114 (7th Cir. 1970); *Hansford v. United States*, 303 F.2d 219, 225-26 (D.C. Cir. 1962) (in banc); *see also United States v. Brown*, 453 F.2d 101, 108 (8th Cir. 1971), *cert. denied*, 405 U.S. 978 (1972); *Whiting v. United States*, 296 F.2d 512 (1st Cir. 1961), *cert. denied*, 375 U.S. 884 (1963).

In balancing probative value and the potential for unfair prejudice to determine if a given item of character evidence may be used to prove predisposition, the courts have emphasized various factors. First, and most basic, is the requirement that the character evidence be rele-

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[2] *continued*
the government's case once the issue of entrapment has been raised; thereafter, the government is required to prove beyond a reasonable doubt that the accused was predisposed to commit the crime and was not entrapped. *E.g., United States v. Townsend*, 555 F.2d 152, 158 (7th Cir.), *cert. denied*, 434 U.S. 897 (1977).

We recognize that the use of prior crimes, wrongs, or specific acts to prove predisposition to commit the crime charged can be viewed as a proof of the accused's character "in order to show that he acted in conformity therewith," and thus can be thought in conflict with Rule 404(b). We read Rules 404(a)(1) and 405(b) as being consistent with Rule 404(b), however, and reconcile them by finding that one of the "other purposes" mentioned in Rule 404(b) is proof of predisposition. Predisposition is similar to other objects of proof mentioned in Rule 404(b) both in that it involves the mental state of the accused at a given time and in that it is often, in effect, an essential element of the government's case. To otherwise interpret Rule 404(b) would, we think, disturb the holding in *Sorrells v. United States*, *supra*, that a "searching" inquiry into predisposition is allowed.

Evidence of predisposition in the form of character evidence is, of course, subject to the qualifications on admissibility contained in Fed. R. Evid. 403, and especially, as is discussed in text *infra*, to the qualification stated in that rule that the probative value of the evidence must outweigh its potential for unfair prejudice.

vant to the predisposition issue. *United States v. Ambrose, supra.* Given the minimal nature of the relevancy requirement under the federal rules,[3] however, relevance will often be present. Second, character evidence that is relevant to the accused's predisposition to commit the crime charged may be of diminished probative value, and may thus be found inadmissible, because it is hearsay; is remote in time from the crimes charged; is uncorroborated and otherwise suspect; is introduced without warning to the accused, who may not, as a consequence, be able to defend against it; or is indicative of character traits that are only minimally relevant to the accused's predisposition. *See, e.g., United States v. Ambrose, supra; United States v. Johnston, supra; Hansford v. United States, supra; Whiting v. United States, supra.*[4] Third, it may also be inferred from the process of balancing probative value against unfair prejudice that character evidence that is relevant to and highly probative of predisposition may sometimes be found inadmissible because its inflammatory nature presents too great a danger of prejudicing the jury against the accused. *Cf. United States v. Ostrowsky,* 501 F.2d 318, 321-23 (7th Cir. 1974).

We think this balancing approach applies not only to the use of character evidence to demonstrate predisposition and rebut an entrapment defense, but also, under certain circumstances,[5] to its use to demonstrate an

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[3] *See* Fed. R. Evid. 401.

[4] In this regard, some courts have indicated that, at least with respect to the use of evidence of prior crimes to prove predisposition, the prior crimes must be similar to the crimes charged. *E.g., DeJong v. United States,* 381 F.2d 725, 726 (9th Cir. 1967); *cf. United States v. Brown, supra; United States v. Owens,* 346 F.2d 329, 332-33 (7th Cir.), *cert. denied,* 382 U.S. 878 (1965).

[5] Character evidence will not always be relevant to a coercion defense. In extreme cases, the issue of coercion may relate not to the accused's mental state but to whether or not the accused was, for example, forced at gunpoint to take a given action. Obviously, mental state and character evidence would be beside the point under such circumstances. On the

(Footnote continued on following page)

absence of compulsion and thus to rebut a defense of coercion. Coercion at the hands of government officials is an "extreme form of entrapment," *United States v. McClain*, 531 F.2d 431, 438 (9th Cir. 1976); *cf. United States v. Townsend, supra*, 555 F.2d at 155 n.3. An accused who asserts government coercion contends that his will was overborne not simply by persistent inducement or tantalizing persuasion, as in the more typical entrapment situation, but by threats, intimidation, or even force. He thus places his character and mental state at issue as does the accused who claims to have been entrapped, and evidence of character bearing upon that issue is similarly admissible to prove either the absence of coercion or the presence of predisposition.

In applying this balancing approach to the facts of this case we note first that none of the evidence of which Murzyn complains was introduced by the government in its case-in-chief. Murzyn himself introduced in his direct examination of informant Ferguson the fact that he had offered to deliver Stechalski to Ferguson and Fitch,[6] and the remainder of the character evidence was introduced by the government to rebut Murzyn's evidence on the entrapment and coercion defenses. Thus Murzyn introduced, among other things, testimony that Fitch had forced Murzyn to give him an expensive dog; that Murzyn had given Ferguson an artist's print of some value; that Fitch had always carried a gun when visiting Murzyn and had displayed guns to Murzyn; that Fitch had appeared to dominate and to intimidate Murzyn; that

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[5] *continued*
other hand, if the accused asserts that he was subtly coerced by threats or intimidation, evidence of the accused's character is relevant to show whether or not he was likely to have been influenced by such pressures.

[6] This matter became an issue at trial because Ferguson had been beaten and robbed by Stechalski, possibly at Murzyn's behest, and had demanded satisfaction. Murzyn's version of the story was that he had been asked to produce Stechalski; the government's version was that he had offered to do so. A taped conversation between Murzyn and Ferguson tends to corroborate the government's version of the story.

Fitch had told Murzyn that he had killed a "nigger"; that Fitch had used crude sexual and racial slang; that Ferguson had threatened Murzyn by indicating that his friend Sanders, who had been suspected along with Ferguson of a murder, would protect Ferguson against his enemies; and that Fitch and Ferguson had told Murzyn, in effect, that he had better supply them with stolen cars "or else." Taken together, this evidence portrayed Murzyn as timid and fearful of Ferguson and Fitch, whom he perceived to be killers that would enforce their requests with violence.

Turning now to the testimony of which Murzyn complains, we note that it was, in the main, narrowly geared to rebut the exact issues Murzyn himself had interjected at trial. The testimony that Murzyn had held a gun to the head of a government officer during a prior investigation and had asked, "Are you a fed?"; had solicited the assassination of a rival drug pusher; had obtained stolen rifles from Stechalski; had displayed guns to Fitch; and had abruptly fired one several times in Fitch's presence spoke directly to the issue of whether Murzyn was intimidated by Fitch, by firearms, or by persons who carried or used firearms. The probative value of this evidence on the issue of coercion, as Murzyn himself had chosen to frame that issue, was high.[7] The danger of unfair prejudice was, given the context in which the evidence was admitted, less great. Murzyn had been shown by overwhelming evidence to have participated in the auto thefts. The only real issue for the

[7] The evidence of which Murzyn complains was not hearsay under the Federal Rules of Evidence, was not remote in time from the offenses charged, and was not otherwise inherently unreliable. In addition, the record indicates that Murzyn was aware of what the government's rebuttal case would be and made the decision to assert his coercion and entrapment defenses in the face of that knowledge. He was not, thus, unprepared to meet the evidence of his prior misconduct. *Cf. United States v. Johnston, supra*, 425 F.2d at 114; *Hansford v. United States, supra*, 303 F.2d at 226. Finally, we think the relevance of the evidence to the entrapment and coercion issue was significant.

jury was whether or not he had been coerced or entrapped. The government's rebuttal evidence, which tracked closely the manner in which Murzyn had presented those defenses, was unquestionably understood by the jury to relate to the coercion and entrapment issues and not to whether Murzyn had stolen the cars or was guilty of the offenses charged because he was a "bad man." *Cf. United States v. Hairrell*, 521 F.2d 1264, 1268 (6th Cir.), *cert. denied*, 423 U.S. 1035 (1975) (quoted in *United States v. Cunningham*, 529 F.2d 884, 887 (6th Cir. 1976)). Any danger that the jury would convict Murzyn simply because he had been shown to be a "bad man" was, we think, outweighed by the necessity of permitting the government to rebut the issues Murzyn himself had raised. *Cf.* Fed. R. Evid. 404(a)(1). Accordingly, the trial court acted within its discretion in admitting the above-mentioned evidence.[8] As the court said many times during the trial, Murzyn himself "opened the door" to precisely the sort of character evidence that was introduced. After Murzyn opened that door, the court was not required to shut it in the government's face.

The remaining evidence of which Murzyn complains was also properly admitted. The testimony by officer Fitch that he used crude racial and sexual slang because Murzyn typically did so and because Fitch had "adopted" Murzyn's terminology to gain his confidence was in direct rebuttal to Murzyn's evidence that Fitch used such slang. The evidence concerning Murzyn's offer to "set up" Stechalski for a beating was, as we have previously noted, introduced by Murzyn himself. Finally, the evidence that Murzyn told Fitch that he had stolen trees, shrubbery, and a cupola tended to show that Murzyn felt comfortable enough with Fitch to

[8] Murzyn has also argued on appeal that, even if introduction of the assassination offer he is alleged to have made to Fitch and Ferguson was not error, the introduction of the precise terms of that offer, including alternative methods of compensating Fitch and Ferguson, was error. We agree that the precise terms of the offer were irrelevant to any material issue in the case, but we find their introduction to have been harmless error.

confide in him.[9] We find no error in the admission of this evidence.

III.

Nurzyn's second contention is that the trial court's failure to instruct the jury, *sua sponte*, that the evidence of Murzyn's character was to be considered on the issues of entrapment and coercion and not on the issue of guilt or innocence prejudiced his defense. Murzyn failed to request a limiting instruction either when the evidence of which he complains was admitted or when the case was submitted to the jury. Whether this failure was mere oversight or was a conscious, tactical choice on the part of his defense counsel, it constitutes a waiver of Murzyn's right to a limiting instruction. As the evidence of Murzyn's character was admissible and was not, in context, unfairly prejudicial, the trial court was not obliged, *sua sponte*, to give a limiting instruction. *See United States v. Cooper*, 577 F.2d 1079, 1088-89 (6th Cir.), *cert. denied*, 439 U.S. 868 (1978).

IV.

Murzyn next argues that the trial court failed to comply with *United States v. Santiago*, 582 F.2d 1128 (7th Cir. 1978), when it admitted hearsay statements made by an alleged co-conspirator and instructed the jury concerning the weight to be accorded those statements. The statements in question were introduced in the form of

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[9] This evidence was only marginally relevant to any issue in the case; its potential for unfair prejudice was also slight, however. We think the better practice would have been to exclude it, but it was not an abuse of discretion to admit it.

Murzyn has also argued that certain statements that were elicited both by defense counsel and by the prosecution gave the jury the impression that Murzyn was a drug dealer and further prejudiced him in their eyes. The evidence involving drugs was slight, and while the jury probably drew the inference that Murzyn had been involved in the sale of drugs, we think that, under all the circumstances, any error involved in its admission was harmless.

taped conversations between officer Fitch and an unidentified male; during the conversations the caller told Fitch that he was a "friend of Mo's," which is Murzyn's nickname, and then told Fitch when and where to take possession of the stolen cars.

Murzyn first contends that the trial court violated the *Santiago* rule when it failed to state the factual basis for its finding, made out of the presence of the jury and by a preponderance of the evidence, that the hearsay statements were made by a co-conspirator as part of a conspiracy in which Murzyn and Hall were participants. *Santiago* does not require that the trial court state on the record the factual basis for its finding. Murzyn next contends that *Santiago* was violated because the trial court did not expressly state that the calls in question were made in the course of and in furtherance of the conspiracy. *Santiago* requires that this finding be made, but it does not require a formalistic statement on the record to that effect. Moreover, as even Murzyn concedes, given the initial finding that a conspiracy existed, it is obvious that the calls were made during the course of and in furtherance of the conspiracy. *Santiago* does not require the trial court to belabor the obvious. The court's findings regarding admission of the hearsay statements were in compliance with *Santiago*.

Murzyn also contends, correctly, that the court's cautionary instruction to the jury prior to admission of the hearsay statements, which is reproduced in the margin,[10] should not have been given. *United States v.*

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[10] The instruction stated:

> Ladies and gentlemen of the jury, there is a rule of law that I will instruct you on in the final instructions, and I will give you a somewhat crude thumbnail sketch of it now, because it's relevant to where we are in the trial.
>
> As a general proposition, one person is not bound by statements that other persons make.
>
> You are not bound by statements that other people make, generally.
>
> That is true in the law unless and until it is established independent of those statements that either a joint enter-

(Footnote continued on following page)

Santiago, supra, 582 F.2d at 1132, 1136.[11] Prior to the giving of the instruction, however, Hall's counsel twice requested the court to give a limiting instruction. Murzyn's counsel did not object on either of these occasions; neither did he object when the trial court announced its intention of giving a limiting instruction, when it gave the instruction, or after the instruction had been given. Murzyn has waived his objection to the giving of the instruction.[12]

Finally, Murzyn contends that the content of the instruction erroneously stated the law of conspiracy, erroneously conveyed the impression that the court had found Murzyn guilty of conspiracy beyond a reasonable doubt, and unfairly prejudiced the defense. Any error in

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[10] *continued*

prise or a conspiracy or some type of agreement of that nature has been entered into.

Once it's established beyond a reasonable doubt that an agreement that results or constitutes conspiracy is proven, then statements made by the participants in a conspiracy—if it is proven beyond a reasonable doubt—are binding upon all the participants in it.

Now that is a crude and rather offhand explanation called the "Co-Conspiracy Hearsay Rule," and I'll instruct you on it finally, but I give you that as a preliminary to the evidence that is about to be offered.

[11] We take this opportunity to reiterate that instructions such as the one quoted in note 10 *supra* should not be given. "[F]or future cases we see neither the need nor desirability of giving the former customary conspiracy instruction limiting the jury's consideration of the declaration of a co-conspirator." *United States v. Santiago, supra*, 582 F.2d at 1136.

[12] Murzyn contends in his brief that the trial court acknowledged that it was giving the limiting instruction "over the objections of both defendants." We have reviewed the trial transcript and we believe the court meant by that statement that it was admitting the hearsay statements over the defendants' objection, and not that it was giving the limiting instruction over objection. The fact that Hall's counsel twice requested that the instruction be given and the further fact that Murzyn's counsel never voiced objection to it, as well as the context in which the court's remark was made, persuade us that our interpretation is correct.

the instruction was cured by the court's final instructions to the jury, of which no complaint is made. Those instructions told the jury both that a conspirator must be proved to have joined a conspiracy solely by evidence of his own acts and declarations[13] and that the court had not expressed and had not intended to express any opinion on the merits of the case. This was sufficient. *See, e.g., United States v. Allegretti*, 340 F.2d 254, 256 (7th Cir. 1964) (in banc) (adopting the reasoning of *United States v. Allegretti*, 340 F.2d 243, 248-53 (7th Cir. 1964) (Knoch, J., dissenting)), *cert. denied*, 381 U.S. 911 (1965). Neither did the instruction cause Murzyn any prejudice by virtue of the fact that it may have implied that the jury had a role in determining the admissibility of the hearsay statements. That implication, though inaccurate, *United States v. Santiago, supra*, could only have benefited Murzyn. *See United States v. McPartlin*, 595 F.2d 1321, 1359 n.42 (7th Cir.), *cert. denied*, 100 S. Ct. 65 (1979). Accordingly, the instruction caused no prejudice to Murzyn and was not reversible error.

V.

Murzyn next contends that alleged prosecutorial and judicial misconduct entitled him to a new trial. He first argues that reference by the prosecutor during closing argument to the character evidence discussed in Part II of this opinion, *supra*, was improper. We have held that evidence to have been properly admitted; reference to it during closing argument was, therefore, proper, and we find no other impropriety in the remarks of which Murzyn complains.

Murzyn also objects to the prosecutor's statement during closing argument that Murzyn was "a thief who would steal anything from a toothpick to the Eiffel

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[13] The proof of membership must be shown by the alleged co-conspirator's own acts and declarations. *Glasser v. United States*, 315 U.S. 60, 74-75 (1942). We note that the Committee on Federal Criminal Jury Instructions recently took the same position. *See* Instruction 5.11 (Conspiracy) and Committee Comments (approved in principle June 8, 1980).

Tower, from a cupola for a chicken coop to shrubbery from a cemetery to 1978 Cadillacs." We do not think the remark went beyond the bounds of argument, especially as it was in part prompted by Murzyn's own testimony at trial that Stechalski "was stealing anything from toothpicks to the Eiffel Tower." In context, we think the jury would have seen in the statement only a hyperbolic assertion that it was Murzyn, and not Stechalski, who had been proved by the evidence to be guilty of the theft of the cars.

Murzyn also contends that the prosecutor's statement to the jury that it should consider "whether or not he [Murzyn] has succeeded in establishing entrapment," was prejudicial because it created the impression that Murzyn had the burden of proving entrapment, when, in fact, the government had the burden of proving the absence of entrapment beyond a reasonable doubt. The statement was not objected to at trial. Any error here was harmless and was cured by the court's final instructions to the jury, which correctly stated the law as to the burden of proof.

Finally, Murzyn cites numerous passages from the record in support of his contention that the trial court unfairly prejudiced the jury by its rulings and remarks during the course of the trial. We have considered the alleged examples of judicial misconduct and have reviewed the trial transcript carefully. The trial judge was at all times fair to Murzyn, allowed him great leeway in presenting his case, and in no sense slanted the proceedings in favor of the government. We need not recite the long list of alleged examples of misconduct because we find, in each instance, that the court acted within its discretion. Murzyn's argument here is without merit.

VI.

Murzyn next contends that errors made by his trial counsel combined to deny him the effective assistance of counsel guaranteed by the Sixth Amendment. We find that Murzyn was provided with representation that met

minimum standards of professional competence as declared in *United States ex rel. Williams v. Twomey*, 510 F.2d 634 (7th Cir.), *cert. denied*, 423 U.S. 876 (1975).

Murzyn first points to the fact that his counsel admitted during the course of the trial that he had not read *Hampton v. United States*, 425 U.S. 484 (1976), the most recent Supreme Court pronouncement on the entrapment defense. Murzyn does not indicate a single instance, however, in which it might be claimed that his counsel's failure to read *Hampton* caused him prejudice.[14] We have discovered no prejudice on the record. Thus, while we view the failure to read *Hampton* as serious, we cannot find, in the absence of prejudice, that it amounted to ineffective assistance of counsel.

Murzyn also argues that his counsel failed to object to certain hearsay testimony, other objectionable testimony, and portions of the government's closing argument. He further finds evidence of incompetence in his counsel's failure to request a limiting instruction concerning the prior misconduct evidence, to move for mistrial after certain allegedly prejudicial errors, and to file post-trial motions. Most of these alleged errors are attributable to trial tactics within the range of acceptable professional competence.[15] At many other points in the trial and post-

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[14] Murzyn has argued that, had his counsel read *Hampton*, he would have understood that character evidence would be admissible in rebuttal to prove predisposition. That proposition was obvious long before *Hampton*, however. *E.g.*, *Sorrells v. United States*, *supra*. Moreover, defense counsel's assertion of the entrapment defense appears to have been the only really viable tactical choice available. It clearly was not, in any event, ineffective assistance of counsel to assert the defense or to assert it in the manner that was chosen.

[15] For example, Murzyn's counsel may have failed to request a limiting instruction concerning the prior misconduct evidence and further failed to object to the government's references to that evidence in closing argument out of a desire to downplay that evidence. The failure to object to certain hearsay testimony may have been due to similar concerns. Murzyn's counsel may also have been trying to avoid the appearance of attempting to prevent the jury from hearing

(Footnote continued on following page)

trial proceedings Murzyn's counsel exhibited skilled advocacy on Murzyn's behalf. Under all of the circumstances, we find that Murzyn received competent counsel. *See, e.g., United States v. Fleming*, 594 F.2d 598, 607 (7th Cir.), *cert. denied*, 442 U.S. 931 (1979); *United States ex rel. Spencer v. Warden*, 545 F.2d 21, 23 (7th Cir. 1976); *United States v. Chaussee*, 536 F.2d 637, 642-43 (7th Cir. 1976).

VII.

Murzyn's final allegation of error is that he was unfairly prejudiced by the introduction of evidence of eight acts of intrastate auto theft or attempted auto theft that were charged as overt acts of conspiracy in the indictment. It was not error for the government to allege in the indictment more overt acts than were necessary. *Capriola v. United States*, 61 F.2d 5, 9 (7th Cir. 1932), *cert. denied*, 287 U.S. 671 (1933). Murzyn cannot argue that the evidence was prejudicial merely because it was cumulative; the government carries a heavy burden in a criminal case and may sustain that burden by proof of more facts than, in retrospect, might appear necessary.

This leaves for consideration only Murzyn's argument that the acts of intrastate auto theft were not overt acts in the charged conspiracy to steal, transport across state lines, and then sell automobiles. We reject this argument also.

It is true that the eight instances of auto theft that occurred totally within one state were not federal crimes and were not, therefore, the objects of the conspiracy charged in the indictment. An overt act need not be a completed offense or the ultimate goal of the conspiracy, however. *See Braverman v. United States*, 317 U.S. 49, 53 (1942). The overt act need only be an action taken in furtherance of the conspiracy by one or more of

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[14] *continued*
the whole truth concerning the coercion issue. We decline the invitation to second-guess trial counsel concerning matters that were merely tactical. *See, e.g., United States ex rel. Rooney v. Housewright*, 568 F.2d 516, 520 (7th Cir. 1977).

the conspirators. *See* 18 U.S.C. § 371; *United States v. Falcone*, 311 U.S. 205, 210 (1940). We find that the acts of intrastate auto theft and sale were, in the language of § 371, acts taken "to effect the object of the conspiracy," which was the interstate transportation and sale of stolen vehicles. The intrastate crimes furthered the interstate crimes that were the object of the conspiracy charged in the indictment in at least two ways: First, the intrastate crimes aided in supplying Fitch with a continuous flow of stolen automobiles; they thus facilitated the interstate crimes by satisfying Fitch's demands for stolen cars and thereby maintaining the relationship with Fitch. Second, the intrastate crimes contributed to the overall development and success of Murzyn's car theft ring; they thereby furthered one object of the ring, the interstate theft and sale of automobiles.

In concluding that the intrastate crimes were correctly alleged and proved to be overt acts in a conspiracy to commit the interstate crimes, we acknowledge that it is unlikely that Murzyn or his co-conspirators conceived of the intrastate crimes as mere means to the accomplishment of the interstate crimes. It is also unlikely that they thought they had entered into two agreements: one to violate federal law and another to violate state law. Whether or not the conspirators so conceived the matter, however, the distinction between state and federal crimes requires us to so view the unlawful combination and to make what may appear to be an artificial inquiry into the relationship between the intrastate and the interstate auto thefts. Given the necessary distinction between the state and the federal crimes, we find that the intrastate crimes were intended to further the interstate crimes in the same manner that they were doubtless intended to further what the conspirators perceived to be a simple agreement to steal and sell cars irrespective of whether a state line was crossed in the process.

VIII.

We turn now to defendant Hall's two allegations of error. Hall argues, first, that the trial court's failure to grant his motion for severance prior to trial and its subsequent failure to order a severance *sua sponte* was prejudicial error. Hall maintains that the evidence admitted against Murzyn prejudiced the jury against Hall. Under settled standards, *see, e.g., United States v. McPartlin*, 595 F.2d 1321, 1332-33 (7th Cir.), *cert. denied*, 100 S. Ct. 65 (1979), Hall was not prejudiced by the joint trial and was not entitled to severance. We reach this conclusion because Hall's defense at trial was that of mistaken identity. Murzyn's defense, as has been stated, was that of entrapment and coercion. The defenses were not antagonistic, and the jury could have totally believed the government's case against Murzyn and still totally believed Hall's defense. The only issue for the jury to resolve as to Hall was whether he was the person the government agents testified they had seen delivering the cars to Fitch. The jury resolved that issue against Hall. There is no indication that they did so because of anything in the government's case against Murzyn. *See United States v. McPartlin, supra*, 595 F.2d at 1333-34.

Hall's second contention is that the trial judge unfairly prejudiced Hall's defense when he said during trial: "The fact of the matter is they haven't invented a camera yet that is as good as the human eye, have they? As a general proposition." The statement was made immediately following Hall's counsel's efforts to break down testimony by a police officer to the effect that, while on surveillance duty at night, his view of a car thief that was alleged to have been Hall was better than the image of the thief in a photograph the officer had taken at the time.

In the interest of caution it might have been better had the court not made the statement of which Hall complains. Even if we were to view the statement as error, however, Hall suffered no prejudice as a result of it. The court, in its final instructions, told the jury to "disregard any statement made during the course of the trial by . . . the Court, which is not supported by the

evidence." He further instructed them to disregard anything he may have said or done during the trial "that some of you might interpret as my views on the weight of the evidence or the credibility of the witnesses" and told them he had "not intended to express any opinion" as to the credibility of witnesses or the merits of the case. This was sufficient to cure any error that might be found in the remarks at issue.

The judgments of conviction are affirmed.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
October 30, 1980

Before
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. William J. Bauer, Circuit Judge
Hon. John Powers Crowley, District Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 79-1861 vs.

RICHARD J. MURZYN,

Defendant-Appellant.

On Petition for Rehearing and Suggestion for Rehearing En Banc.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by Defendant-Appellant Richard J. Murzyn, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable John Powers Crowley, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, is sitting by designation.

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